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IN THE

Supreme Court of the United States.

OCTOBER TERM, ~~1958~~ 1959

No. 202

FRANK DESIMONE,

Petitioner,

vs.

UNITED STATES OF AMERICA.

Petition for Writ of Certiorari to the United States Court of Appeals for the Ninth Circuit.

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Assuming that the rule of the Ahrens case be not applicable to the situation in the instant case (which we do not concede), then the court below has decided an important question of federal law, viz., whether the jurisdiction of the District Courts to issue writs of habeas corpus ad testificandum extends beyond their territorial jurisdiction, which question has not been but should be settled by this court 13

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IN THE

Supreme Court of the United States

OCTOBER TERM, ~~1958~~ 1959

No. .....

FRANK DESIMONE,

Petitioner,

vs.

UNITED STATES OF AMERICA.

Petition for Writ of Certiorari to the United States Court of Appeals for the Ninth Circuit.

Petitioner, Frank DeSimone, respectfully prays for a Writ of Certiorari to the United States Court of Appeals for the Ninth Circuit in order to review its judgment dismissing petitioner's appeal from the order of the United States District Court for the Southern District of California denying petitioner's motion to quash the writ of habeas corpus *ad testificandum* issued by said District Court at the request of the United States Attorney for the Southern District of California, and directing that the petitioner, then in the custody of the Warden of the Federal Detention Headquarters in New York City, New York, be produced before a Federal Grand Jury in said Southern District of California for the purpose of petitioner's testifying as a witness before said Grand Jury.

Opinions Below.

The District Court delivered no written opinion upon the making of its order denying petitioner's motion to quash said writ.

A copy of the opinion of the Court of Appeals for the Ninth Circuit is appended hereto and marked Appendix "A".

The judgment of said Court of Appeals is appended hereto and marked Appendix "B".

Grounds on Which the Jurisdiction of This Court Is Invoked.

1. The date of the judgment sought to be reviewed is April 29, 1959.

2. The statutory provisions believed to confer on this Court jurisdiction to review the judgment in question by writ of certiorari are 28 U. S. C. 1254(1); 28 U. S. C. 2101; and, 28 U. S. C. 2241.

Questions Presented for Review.

Does a district court have jurisdiction to issue a writ of habeas corpus *ad testificandum* requiring the production of a prisoner, then confined beyond said court's territorial jurisdiction, to appear before a grand jury in said district for the purpose of said prisoner's testifying as a witness before said grand jury?

Do the provisions of the "all writs" statute give said district court jurisdiction to order said prisoner from outside of its territorial jurisdiction for the purpose of requiring him to appear and testify before a grand jury in said district?

Statutes Involved.

The statute under which said writ of habeas corpus *ad testificandum* was issued is 28 U. S. C. 2241, (June 25, 1948, c. 646, 62 Stat. 964, amended May 24, 1949, c. 139, Par. 112, 63 Stat. 105).

The statute relied upon by the Court of Appeals in its decision is 28 U. S. C. 1651(a). (June 25, 1948, c. 646, 62 Stat. 944, amended May 24, 1949, c. 139. Par. 90, 63 Stat. 102.)

The statute interpreted by this Court in the *Hayman* case, *infra*, and which case is relied upon by the Court of Appeals in its decision, is 28 U. S. C. 2255, (June 25, 1948, c. 646, 62 Stat. 967, amended May 24, 1949, c. 139, Par. 114, 63 Stat. 105).

The texts of said statutes are set out hereinafter as Appendix "C".

Statement of the Case.

Basis for Federal Jurisdiction in the Court of First Instance.

The trial court had jurisdiction under 28 U. S. C. 2241.

Facts.

In February of 1959, petitioner, an attorney at law in the State of California, was in custody of the Attorney General of the United States, serving a term of six months' imprisonment pursuant to a commitment based upon a judgment of contempt rendered by the United States District Court for the Southern District of New York. The contempt arose out of the failure of the petitioner to appear at a specified time in response to a subpoena ordering him to appear before a Grand Jury in the Southern District of New York. An appeal has been

taken from said judgment and is now pending before the United States Court of Appeals for the Second Circuit. Meanwhile, petitioner is still in custody serving his term of imprisonment.

On February 25, 1959, an application was made to the United States District Court for the Southern District of California by the United States Attorney for said District, for a writ of habeas corpus *ad testificandum* directed to the Warden of the Federal Detention Headquarters, New York City, who was petitioner's then custodian, commanding said Warden to produce petitioner before a special Grand Jury which had theretofore been impaneled in said district, for the purpose of having said witness testify as a witness before said Grand Jury. (Vol. I, Document No. 1.) Said application was granted, the clerk of said Court issued said writ, and the hearing thereon was set for March 24, 1959. (Vol. I, Document No. 2.) Pursuant to said writ, petitioner was brought from New York to Los Angeles, California. On March 23, 1959, petitioner filed a motion to quash said writ upon the ground, among others, that the issuance of said writ was in excess of the District Court's jurisdiction. (Vol. I, Document No. 3.) Hearing on said motion was had on March 24, 1959, before United States District Judge Harry C. Westover, and on April 3, 1959, Judge Westover made and entered an order denying said motion. (Vol. I, Document No. 6.) Thereafter, and on April 9, 1959, petitioner filed notice of appeal to the United States Court of Appeals for the Ninth Circuit from the District Court's order denying said motion to quash said writ. (Vol. I, Document No. 7.) The Government then gave notice of motion to dismiss said appeal upon the ground that said appeal was frivolous and taken solely for the purpose of delay. (Vol. II, pp. 1-16,

inc.) Hearing on said motion was had before said Court of Appeals, and on April 29, 1959, said Court rendered its decision holding that the writ was authorized by the "all writs" statute, Title 28, Section 1651(a), and "for reasons similar to those stated in United States vs. Hayman, 342 U. S. 205, 220-221," and that the appeal was frivolous and should be dismissed. (Vol. II, p. 26; Appx. "A".) Judgment dismissing said appeal was entered on said April 29, 1959, (Vol. II, p. 27; Appx. "B"), mandate was issued on the same day, and on May 11, 1959, on motion of the Government, said mandate was spread upon the records of said District Court.

REASONS FOR GRANTING THE WRIT AND ARGUMENT AMPLIFYING SAME.

I.

The Decision of the Court Below Is in Conflict With Applicable Decisions of This Court.

The decision below is in conflict with this Court's decisions in *Ahrens v. Clark*, 335 U. S. 188, 92 L. Ed. 1898; and *Johnson v. Eisentrager*, 339 U. S. 763, 94 L. Ed. 1255, respectively.

In the instant case, the court below held that the writ of habeas corpus *ad testificandum*, issued by the District Court in California, authorized the producing of petitioner in California to testify before a Grand Jury there, though said petitioner was not within the territorial jurisdiction of said District Court at the time of the issuance of said writ.

The petitioner was serving a sentence imposed by the District Court for the Southern District of New York, and was confined in the Federal Detention Headquarters in New York City, in the custody of the Warden of that

institution, when the writ of habeas corpus *ad testificandum* was issued by the District Court for the Southern District of California directing the said Warden to produce the petitioner before a Grand Jury sitting in said Southern District of California; in other words, petitioner was clearly outside the territorial jurisdiction of said District Court when said writ was issued, and under the rule laid down in the *Ahrens* case that court was without jurisdiction to issue said writ.

In the *Ahrens* case, petitions for writs of habeas corpus were filed in the District Court for the District of Columbia. The prisoners were confined outside of that district and at Ellis Island in New York. The Court there held that the term "within their respective jurisdictions," as that phrase is used in 28 U. S. C. 452 (now 28 U. S. C. 2241) with reference to the power of the courts to issue writ of habeas corpus, limits the district courts' powers in that respect to the territorial jurisdictions of those courts, and that only where specific exceptions have been created by Congress is it otherwise (pp. 189-191). After tracing the history of the statute, this Court held that the jurisdiction of the District Court to issue a writ of habeas corpus is confined to cases where the one detained is within the territorial jurisdiction of the Federal District Court issuing the writ, and that that court does not have jurisdiction to issue such writ where the person detained is outside of the territorial jurisdiction of said court (pp. 191-193).

In the case of *Johnson v. Eisentrager, supra*, this court said:

> "We have consistently adhered to and recognized the general rule laid down in Ahrens v. Clark" (pp. 778-779).

The *Ahrens* case has never been overruled; on the contrary, it has been followed and approved by this Court in the *Johnson* case, *supra,* and in many decisions of the Court of Appeals for the various Circuits, and in some of which cases certiorari was denied by this Court. These cases are listed and referred to hereinafter.

The court below, contrary to this Court's ruling in the *Ahrens* case, held that the District Court in California had the power to order that petitioner be brought from New York, outside of said Court's territorial jurisdiction, and based its holding on the "all writs" statute (Title 28, U. S. C. 1651), "and for reasons similar to those stated in United States v. Hayman, 342 U. S. 205, 220-221."

In the *Hayman* case, it will be noted that the proceedings had were under Section 2255 of Title 28, U. S. C., and Section 2241 (the habeas corpus section) was not involved therein. In that case, the prisoner was confined in the Federal penitentiary in the State of Washington. He filed, in the District Court for the Southern District of California, a motion under said Section 2255 to vacate the sentence theretofore imposed upon him by that Court. He also requested an order to secure his presence at said hearing. The hearing was had without the prisoner's presence, and his motion to vacate was denied.

In its opinion in the *Hayman* case, this Court traces and discusses the reasons for the adoption of said Section 2255, chief among which was the increase in the number of applications for habeas corpus filed for the purpose of challenging convictions, and which applications, of necessity, were required to be filed in the district in which the prisoner was confined, though the facts had taken

place in the district in which the prisoner had been sentenced. In this connection, this Court said:

> "This review of the history of Section 2255 shows that it was passed at the instance of the Judicial Conference to meet practical difficulties that had arisen in administering the habeas corpus jurisdiction of the federal courts. Nowhere in the history of Section 2255 do we find any purpose to impinge upon prisoners' rights of collateral attack upon their convictions. On the contrary, the sole purpose was to minimize the difficulties encountered in habeas corpus hearings by affording the same rights in another and more convenient forum" (pp. 218-219).

This Court there held that Section 2255 required that the trial court "grant" a prompt hearing thereon," that in requiring a "hearing" the section "has obvious reference to the tradition of judicial proceedings" and that the District Court did not proceed in conformity with Section 2255 when it decided controverted issues of fact without notice to the prisoner and without his presence (pp. 219-221). This Court then held that the District Court is not impotent to hold the hearing required under Section 2255 and to require the prisoner's presence at said hearing so long as it may invoke the statutory authority of all Federal courts to issue "all writs necessary to appropriate in aid of their respective jurisdictions and agreeable to the usages and principles of law," (28 U. S. C. 1651a), and held that "An order to secure the prisoner's presence in the sentencing court to testify or otherwise prosecute his motion is 'necessary or approriate' to the exercise of its jurisdiction under Section 2255."

It will be noted that the jurisdiction was given the sentencing court under Section 2255 to hold such hearing, and

this Court held that the use of an order under the "all writs" statute was "necessary and appropriate" to the exercise of that jurisdiction which the Court had *under the section itself*. As was said by this Court:

> "Issuance of an order to produce the prisoner is auxiliary to the *jurisdiction of the trial court over respondent granted in Section 2255 itself* and invoked by respondent's filing of a motion under that Section" (pp. 219-221). (Emphasis ours.)

However, under Section 2241, the jurisdiction of the District Court is limited to its territorial jurisdiction, and the "all writs" statute (Section 1651) cannot enlarge the jurisdiction of that Court; and, as has been said, while Section 1651 augments the power of a court in cases of *existing jurisdiction* (as in the case of Section 2255) it in no wise extends or expands the court's territorial jurisdiction.

As clearly demonstrating the inapplicability of the rule laid down in the *Hayman* case to the situation in the instant case, nd pointing out its adherence to the principle enunciated in the *Ahrens* case relating to the territorial jurisdiction of district courts in the issuance of writs of habeas corpus, this Court, in the *Hayman* case, said:

> "The Court below also held that the sentencing court could not hold the required hearing because it was without power to order the presence of a prisoner confined in another district. This power was thought to follow from our decision in Ahrens v. Clark, 335 U. S. 188, 92 L. Ed. 1898, where we held that the phrase 'within their respective jurisdictions' in the habeas corpus statute (28 U. S. C. 452, now 2241) required the presence of the prisoner within the territorial jurisdiction of the District Court as

a prerequisite to his filing of an application for habeas corpus. THIS IS NOT A HABEAS CORPUS PROCEEDING. THE SENTENCING COURT IN THE SOUTHERN DISTRICT OF CALIFORNIA WOULD NOT BE ISSUING AN ORIGINAL WRIT OF HABEAS CORPUS TO SECURE RESPONDENT'S PRESENCE IN ANOTHER DISTRICT. *Issuance of an order to produce the prisoner is auxiliary to the jurisdiction of the trial court over respondent granted in Section 2255 itself and invoked by respondent's filing of a motion under that section"* (pp. 219-221). (Emphasis ours.)

Under this Court's Rule 19(1)(b) (4th phrase), because of the conflict between the instant case and the cases discussed under this Point I, the granting of certiorari is justified.

II.

The Decision of the Court Below Is in Conflict With Decisions of Other Courts of Appeal on the Same Subject.

The decision below conflicts with the decisions of the United States Courts of Appeal in the following cases:

Crowe v. United States, 169 F. 2d 1022 (C. A. 4);

McAffee v. Clemmer, 171 F. 2d 131 (C. A. Dist. of Col.); certiorari denied;

White v. United States, 190 F. 2d 365 (C. A. 6);

Hibdon v. Warden, etc., 245 F. 2d 816 (C. A. 6);

Edgerly v. Kennelly, 215 F. 2d 420 (C. A. 7);

Johnson v. Matthews, 182 F. 2d 677 (C. A. Dist. of Col.); certiorari denied;

Goldberg v. Hoffman, 225 F. 2d 463 (C. A. 7).

All of the foregoing cases follow the rule laid down in the *Ahrens* case with reference to the territorial jurisdiction of the district courts in habeas corpus cases.

In the *Edgerly* case, *supra*, the Court of Appeals for the Seventh Circuit held that the District Court in Illinois was without jurisdiction to issue a writ of habeas corpus *ad testificandum* directed to the Warden of the prison at Alcatraz to produce a prisoner confined in that institution, to give testimony in court in Chicago, Illinois.

In discussing the limitation upon the jurisdiction of the courts in habeas corpus cases, and the contention that the "all writs" statute enlarged that jurisdiction, the Court of Appeals said:

> "Plaintiff concedes that the jurisdiction of the court, if it exists, must be found in the 'all writs' statute, 28 U. S. C. A. 1651, which authorizes the courts 'to issue all writs necessary or appropriate in aid of their respective jurisdictions and agreeable to the usages and principles of law.' It is pointed out that the court had jurisdiction of the action and it was in aid of its jurisdiction that the plaintiff be brought to Chicago to testify in his own behalf. *This contention, if accepted, would mean that this provision enlarged the territorial jurisdiction of the court. We think that such is not its purpose. While the section augments the power of a court in cases of existing jurisdiction, it in no wise extends or expands its territorial jurisdiction.*
>
> "As stated in In re Previn, 1 Cir. 204 F. 2d 417, 418, 'The sole purpose of 1651 and of its statutory predecessors was to assure to the various federal courts the power to issue appropriate writs and or-

ders of an auxiliary nature *in aid of their respective jurisdictions as conferred by other provisions of law*" (p. 427). (Emphasis ours.)

The Court of Appeals then cites cases, including the *Ahrens* case, holding that the District Courts cannot issue process beyond their territorial limits, and that a specific exception by Congress is necessary to the extension of a district court's jurisdiction.

And in the *Goldberg* case, *supra*, in dealing with the same subjects, the Court of Appeals in its decision, said:

"The historic limitation of the jurisdiction of the various federal courts to the circuit or district in which they sit, is too well established to require restatement. Georgia v. Pennsylvania R. R. Co. 324 U. S. 439, 467, 65 S. Ct. 716, 89 L. Ed. 1051; Edgerly v. Kennelly, 7 Cir. 215 F. 2d 420, Reconstruction Finance Co. v. Maley, 7 Cir., 125 F. 2d 131, 137. *We have recently rejected as untenable the theory that the All Writs Act, 28 U. S. C. A. Par. 1651, may enlarge the territorial jurisdiction of the federal courts.* Edgerly v. Kennelly, supra, 215 F. 2d at pages 421-422. See also Ahrens v. Clark, 335 U. S. 188, 68 S. Ct. 1443, 92 L. Ed. 1898" (p. 467). (Emphasis ours.)

Under this Court's Rule 19(1)(b) (1st phrase) this is a proper case for the granting of certiorari so that the conflict in these decisions may be resolved by this Court.

III.

Assuming That the Rule of the Ahrens Case Be Not Applicable to the Situation in the Instant Case (Which We Do Not Concede), Then the Court Below Has Decided an Important Question of Federal Law, Viz., Whether the Jurisdiction of the District Courts to Issue Writs of Habeas Corpus Ad Testificandum Extends Beyond Their Territorial Jurisdiction, Which Question Has Not Been but Should Be Settled by This Court.

We have attempted to show that the decision of the Court below is in conflict with the decisions of this Court in the *Ahrens* and *Johnson* cases, respectively, and also with the decisions in the numerous cases decided by the various United States Courts of Appeal. If this Court should hold that no such conflict, as suggested, appears, then the Court below has decided an important question of Federal Law, which has not been, but should be, settled by this Court. That question is: Does the jurisdiction of the district courts to issue writs of habeas corpus *ad testificandum* extend beyond the territorial jurisdiction of those courts?

Under the circumstances, this is a proper case under this Court's Rule 19(1)(b) (3rd phrase) to grant certiorari.

Conclusion.

For the foregoing reasons, the petition for writ of certiorari should be granted, and upon review by this Court of the judgment of the Court of Appeals for the Southern District of California, said judgment should be reversed.

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Of Counsel.

APPENDIX "A."

United States Court of Appeals for the Ninth Circuit.

Frank DeSimone, Appellant, vs. United States of America, Appellee. Misc. No. 843.

Upon Motion to Dismiss Appeal.

Before: POPE, STEPHENS and HAMLIN, Circuit Judges

Per Curiam.

The writ under which it was commanded that appellant be produced to testify before the Grand Jury at Los Angeles was authorized by the "all writs statute," Title 28, Sec. 1651(a) and for reasons similar to those stated in United States v. Hayman, 342 U. S. 205, 220-221. And since bringing appellant to testify before a grand jury is a bringing of him "into court to testify" within the meaning of Title 28 Sec. 2241(c)(5) we hold the appeal frivolous and it is dismissed.

/s/ WALTER L. POPE
/s/ ALBERT LEE STEPHENS
/s/ OLIVER D. HAMLIN
United States Circuit Judges

(ENDORSED) Filed April 29, 1959
PAUL P. O'BRIEN, Clerk.

APPENDIX "B."

United States Court of Appeals for the Ninth Circuit.

Frank DeSimone, Appellant, vs. United States of America, Appellee. Misc. No. 843.

JUDGMENT.

Appeal from the United States District Court for the Southern District of California, Central Division.

This cause came on to be heard on the Transcript of the Record from the United States District Court for the Southern District of California, Central Division, and on motion of appellee for dismissal of the appeal herein, and was duly submitted.

On consideration whereof, it is now here ordered and adjudged by this Court, that the motion to dismiss be, and hereby is granted, and that the appeal in this cause be, and hereby is dismissed.

(ENDORSED) Judgment

Filed and entered: April 29, 1959

PAUL P. O'BRIEN, Clerk.

APPENDIX "C."

28 U. S. C. 1651. Writs:

(a) The Supreme Court and all courts established by Act of Congress may issue all writs necessary or appropriate in aid of their respective jurisdictions and agreeable to the usages and principles of law.

(b) An alternative writ or rule nisi may be issued by a justice or judge of a court which has jurisdiction. June 25, 1948, c. 646, 62 Stat. 944, amended May 24, 1949, c. 139, Par. 90, 63 Stat. 102.

* * * * * * * *

28 U. S. C. 2241. Power to Grant Writ:

(a) Writs of habeas corpus may be granted by the Supreme Court, any justice thereof, the district courts and any circuit judge within their respective jurisdictions. The order of a circuit judge shall be entered in the records of the district court of the district wherein the restraint complained of is had.

(b) The Supreme Court, any justice thereof, and any circuit judge may decline to entertain an application for a writ of habeas corpus and may transfer the application for hearing and determination to the district court having jurisdiction to entertain it.

(c) The writ of habeas corpus shall not extend to a prisoner unless:

(1) He is in custody under or by color of the authority of the United States or is committed for trial before some court thereof; or,

(2) He is in custody for an act done or omitted in pursuance of an Act of Congress, or an

order, process, judgment or decree of a court or judge of the United States: or,

(3) He is in custody in violation of the Constitution or laws or treaties of the United States; or,

(4) He, being a citizen of a foreign state and domiciled therein, is in custody for an act done or omitted under any alleged right, title, authority, privilege, protection, or exemption claimed under the commission, order or sanction of any foreign state, or under color thereof, the validity and effect of which depend upon the law of nations; or,

(5) It is necessary to bring him into court to testify or for trial. June 25, 1948, c. 646, 62 Stat. 964, amended May 24, 1949, c. 139, Par. 112, 63 Stat. 105.

* * * * * * * *

28 U. S. C. 2255. Federal custody; remedies on motion attacking sentence:

A prisoner in custody under sentence of a court established by Act of Congress claiming the right to be released upon the ground that the sentence was imposed in violation of the Constitution or laws of the United States, or that the court was without jurisdiction to impose such sentence, or that the sentence was in excess of the maximum authorized by law, or is otherwise subject to collateral attack, may move the court which imposed the sentence to vacate, set aside or correct the sentence.

A motion for such relief may be made at any time.

Unless the motion and the files and records of the case conclusively show that the prisoner is entitled to no relief,

the court shall cause notice thereof to be served upon the United States attorney, grant a prompt hearing thereon, determine the issues and make findings of fact and conclusions of law with respect thereto. If the court finds that the judgment was rendered without jurisdiction, or that the sentence imposed was not authorized by law or otherwise open to collateral attack, or that there has been such a denial or infringement of the constitutional rights of the prisoner as to render its judgment vulnerable to collateral attack, the court shall vacate and set the judgment aside and shall discharge the prisoner or resentence him or grant a new trial or correct the sentence as may appear appropriate.

A court may entertain and determine such motion without requiring the production of the prisoner at the hearing.

The sentencing court shall not be required to entertain a second or successive motion for similar relief on behalf of the same prisoner.

An appeal may be taken to the court of appeals from the order entered on the motion as from a final judgment on application for a writ of habeas corpus.

An application for a writ of habeas corpus on behalf of a prisoner who is authorized to apply for relief by motion pursuant to this section, shall not be entertained if it appears that the applicant has failed to apply for relief, by motion, to the court which sentenced him, or that such court has denied him relief, unless it also appears that the remedy by motion is inadequate or ineffective to test the legality of his detention. June 25, 1948, c. 646, 62 Stat. 967, amended May 24, 1949, c. 139, Par. 114, 63 Stat. 105.